RECENT DECISIONS.

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ADMIRALTY—SALVAGE—INDIRECT ADVANTAGE TO VESSEL.—A vessel in a drydock was near a mill which took fire. Libellant's tug succeeded in confining the fire to the mill, and sought salvage from the vessel in the drydock. *Held,* since no direct service was rendered the vessel, salvage should not be allowed. *The San Cristobal* (D. C. S. D. Ala. 1914) 215 Fed. 615.

It was held in the *City of Atlanta* (D. C. 1893) 56 Fed. 252, upon which the principal case is based, that towing a burning steamer away from another vessel while salving the former would not subject the latter vessel to a salvage claim, and for the apparent reason that there was no purpose evinced to save the latter vessel and that her being saved was a mere incident to the salvage of the first. Such services, however, are sufficient to found a salvage claim, and accordingly salvage should be allowed for them when they are rendered to save the stationary vessel. *Straits of Gibraltar* (D. C. 1887) 32 Fed. 297. Even giving advice to a vessel in danger may entitle the adviser to salvage. *The Eliza* (1862) Lush. 536. From this it appears to be evident that the vessel in fact saved need not be directly acted upon in order to have salvage services rendered it. A fire on a pier may subject a vessel to a maritime peril, and towing her away is sufficient to entitle the tower to salvage. *The Indiana* (D. C. 1885) 22 Fed. 925; *The Holland* (D. C. 1890) 44 Fed. 362; *The Tees* (1862) Lush. 505. If, therefore, in the principal case, the purpose of the libellant's tugs in combatting the fire was to save the San Cristobal and if she was in apparent peril, it is difficult to see why, on authority, they were not entitled to salvage just as though they had towed the vessel itself out of danger. The fact that the vessel was in a drydock is not sufficient to defeat the jurisdiction of admiralty to allow salvage. *The Steamship Jefferson* (1909) 215 U. S. 130.

BANKRUPTCY—SCHEDULES—PRIVILEGE AGAINST SELF INCRIMINATION.—In an involuntary proceeding, a bankrupt declined to answer the receiver's questions as to schedules which had been already filed. *Semble,* since the questions opened the way to no independent fact, the refusal could not be justified on the ground of self-incrimination. *Re Tobias, Greenthal & Mendelson* (D. C. N. Y. 1914) 215 Fed. 815.

A filed schedule, which is really an assertion of fact as to property owned by the bankrupt, Bankr. Act of 1898, § 7 (8), was formerly construed as a pleading under Rev. Stat. § 860. *Johnson* v. *United States* (C. C. A. 1908) 163 Fed. 30. This section, however, which forbade the use of pleadings in any criminal proceeding, has since been repealed. 36 U. S. Stat. L. 352. The Bankruptcy Act of 1898, § 7 (9), provides merely that testimony given by a bankrupt upon examination shall not be used against him in criminal proceedings, and this enactment, therefore, cannot be invoked in behalf of exclusion of schedules. *Ensign* v. *Pennsylvania* (1913) 227 U. S. 592. Furthermore, since it affords no absolute immunity from prosecution, see *Burrell* v. *Montana* (1904) 194 U. S. 572, it cannot be construed to deprive the bankrupt

of his constitutional privilege against self incrimination. *United States* v. *Simon* (D. C. 1906) 146 Fed. 89. The privilege conferred by the Fifth Amendment, moreover, while in terms limited to federal criminal actions, should not be strictly construed. *Counselman* v. *Hitchcock* (1892) 142 U. S. 547, 562. The privilege may be waived, if the testimony is voluntarily given, see *Jacobs* v. *United States* (C. C. A. 1908) 161 Fed. 694, or if objection is not made at the time of the answer. *Burrell* v. *Montana, supra.* In the absence of such waiver it would seem that a bankrupt, provided his objection is of a sufficiently definite nature, see Black, Bankruptcy, § 271, is still protected in the federal courts, from giving incriminating answers to questions concerning his schedule.

BANKRUPTCY—SEDUCTION—DISCHARGEABLE LIABILITIES.—A judgment was recovered against the bankrupt for breach of promise to marry, and damages were allowed for seduction. *Held,* that such a judgment was a liability, which, by the Amendment of 1903, to § 17 of the Bankruptcy Act of 1898 could not be discharged. *In re Grounds* (D. C. N. D. N. Y. 1914) 215 Fed. 280.

By statute in several States, a woman is permitted to sue for her own seduction, a right denied her at common law. *Marshall* v. *Taylor* (1893) 98 Cal. 55; *Weiher* v. *Meyersham* (1883) 50 Mich. 602; see *Paul* v. *Frazier* (1807) 3 Mass. 71. Where such is the case, even before the Amendment of 1903 a judgment so recovered was held non-dischargeable in bankruptcy as it was based on a wilful and malicious injury to person. *In re Maples* (D. C. 1901) 105 Fed. 919. But courts disagreed on the question whether an action brought by the parent or guardian could be said to be such a wilful and malicious injury to the person or property of the parties suing as to prevent a discharge. *In re Freche* (D. C. 1901) 109 Fed. 620; *In re Sullivan* (1899) 2 Am. Bank. R. 30. Where the action, however, was one for breach of promise to marry with seduction alleged as an element of damage, it has been held that as the action was one of contract it should be discharged. *In re McCauley* (D. C. 1900) 101 Fed. 223. It would seem, however, that as the basis of this action is really tortious in character, and as it is the only remedy the injured party has in the States where the common law disability still applies, and as the Bankruptcy Act is not intended to shield wrongdoers from meeting the obligations of their torts, the principal case is correct in holding that a judgment so rendered was intended by Congress to be considered liability for seduction, within the meaning of the Amendment of 1903 to § 17. *In re Warth* (C. C. A. 1912) 200 Fed. 408. And this reason might readily be applied to the objections against discharging an action brought by the parent or guardian.

CARRIERS—LIABILITY FOR LOSS OF MAIL.—Certain mail matter was lost in a collision due to the negligence of the defendant railroad's employees. The Postmaster-General, by virtue of Post Office Regulations, § 1489, imposed a fine for the offense. The United States, as bailee of the senders, then brought suit for the value of the lost mail. *Held,* the remedy by fine was exclusive, and the plaintiff could not recover. *United States* v. *Atlantic Coast Line R. R.* (C. C. A. 1914) 215 Fed. 56.

Officials of the post-office department, while answerable for their own defaults, for reasons of policy are generally exempt from liability

for the negligence of their subordinates, who are themselves regarded as public officers. *Dunlop* v. *Munroe* (1812) 7 Cranch. 242, 269; *Keenan* v. *Southworth* (1872) 110 Mass. 474; Mechem, Agency (2nd ed.) §§ 1502-3. This exemption has sometimes been extended to mail contractors for the acts of their servants in handling the mail. *Boston Ins. Co.* v. *Chicago etc. Ry.* (1902) 118 Ia. 423; *Bankers etc. Co.* v. *Minneapolis etc. Ry.* (C. C. A. 1902) 117 Fed. 434. The postmaster, however, is at most a vice-principal, for his subordinates are in fact, the servants of the government, whereas the employees of the carrier are in every legal sense its servants, only incidentally engaged in public service, and it would therefore seem that as to them the rule of *respondeat superior* should apply. See 14 Columbia Law Rev. 632; *Sawyer* v. *Corse* (1867) 58 Va. 230; *Central etc. Co.* v. *Lampley* (1884) 76 Ala. 357. If, then, the owner has a right of action against the carrier, it must continue, regardless of the provisions of the contract between the carrier and the government. It is, therefore, unreasonable to suppose that the post-office regulation above, which merely provides a remedy for a breach of public duty, *cf. Parker* v. *United States* (1891) 26 C. C. 344, 357, was intended to negative the government's right to sue as bailee for the private wrong to the owner. *Cf. The Winkfield* L. R. [1902] P. 42; *United States* v. *American Surety Co.* (C. C. 1908) 161 Fed. 149.

CONSTITUTIONAL LAW—QUALIFICATIONS OF VOTERS—POWER OF THE LEGISLATURE TO EXTEND SUFFRAGE TO WOMEN.—A statute conferred upon women the right to vote for officers and upon questions specified therein. The state constitution limited voters at "any election" to male citizens duly qualified. *Held,* the statute is constitutional except in so far as it authorizes women to vote for an officer or upon a question expressly provided for by the Constitution. *Scown* v. *Czarnecki* (Ill. 1914) 106 N. E. 276.

Since a state legislature has power to pass any law not specifically or impliedly forbidden by the state or federal constitution, Cooley, Const. Lim. (7th ed.) 127 *et seq.,* it may, in the absence of constitutional limitation, extend suffrage to any person it sees fit. In a few cases it has been held that a constitutional designation of "voters" applies only to officers and questions specifically mentioned in that instrument; *Hanna* v. *Young* (1896) 84 Md. 179; *Buckner* v. *Gordon* (1884) 81 Ky. 665; but in other jurisdictions, because of the express language of the constitution, such definition extends to voters for statutory officers as well. *Matter of Gage* (1894) 141 N. Y. 112; *State* v. *Blake* (1894) 57 N. J. L. 6; see *Coggeshall* v. *Des Moines* (1908) 138 Ia. 730. The extension of voting privileges to women in the election of school district officers is allowed almost everywhere, either because the officers are not mentioned in the constitution, or because of the sweeping duty imposed in broad terms upon the legislature to provide for a school system. *Wheeler* v. *Brady* (1875) 15 Kan. 26; *State* v. *Cones* (1884) 15 Neb. 444; *Belles* v. *Burr* (1889) 76 Mich. 1; *Plummer* v. *Yost* (1893) 144 Ill. 68; but see *Kimball* v. *Hendee* (1894) 57 N. J. L. 307. On principle, there would seem to be no vital distinction between school district officers and other statutory officers. *Kimball* v. *Hendee, supra.* And as no such definite limitation is imposed by the constitution of Illinois as by those of New Jersey, New York or Iowa, the construction given that instrument in the principal case, is, perhaps, a fair one; but it would seem to be safer to recognize the case of school district officers as anomalous, and to confine the excep-

tion from constitutional limitations to them alone. See *State* v. *Board of Elections* (1895) 9 Ohio C. C. 134; *Coffin* v. *Election Commissioners* (1893) 97 Mich. 188; *Matter of Gage, supra.*

CONSTITUTIONAL LAW—TREATIES—DISPLACEMENT OF STATE LAWS.—An Italian consul claimed the right to be appointed administrator of the estate of an Italian subject who died intestate in New York. *Held,* the treaty giving the consul the right to be appointed administrator of such estate, "so far as the laws of each country will permit," did not confer the right absolutely, so as to displace the state laws of administration. *In re D'Adamo's Estate* (N. Y. 1914) 106 N. E. 81. See Notes, p. 667.

CONTRACTS—CONTRACTOR'S BOND—RIGHTS OF THIRD PARTIES.—In an action by a sub-contractor upon a bond furnished by the contractor to the owner of the building to guarantee performance and payment of all claims for labor and materials, *held,* the bond was for the protection of the owner, and the sub-contractor could not sue thereon, in the absence of an express provision that it should inure to the benefit of third persons. *Cleveland Metal Roofing & Ceiling Co.* v. *Gaspard* (Ohio, 1914) 106 N. E. 9. See Notes, p. 669.

CONTRACTS—OPTION—ACCEPTANCE—TENDER OF PURCHASE PRICE.—The plaintiff agreed to take and offered to pay for certain shares of stock, on which the defendant had given him a thirty day option, which was without consideration. *Held,* on this evidence, the jury would have been justified in finding that there was an acceptance by the mere offer to pay, since tender of the purchase price was excused by the defendant's refusal to deliver the stock. *Brinley* v. *Nevins* (N. Y. 1914) 162 App. Div. 744.

An offer unsupported by a consideration may be revoked at any time before acceptance, even though by its terms it is to remain open a definite time. *Pomeroy* v. *Newell* (N. Y. 1907) 117 App. Div. 800; *Moise* v. *Rock Springs Distilling Co.* (1907) 79 Neb. 124; *Crandall* v. *Willig* (1897) 166 Ill. 233. Since the intention of the parties in the principal case was not clearly expressed, the question was whether the offer had been accepted. If the offer is construed as contemplating a bilateral contract, the agreement of the offeree to purchase is sufficient acceptance and creates a contract for sale, with concurrent conditions of payment by the vendee and delivery by the vendor. *Stewart* v. *Gillett* (N. Y. 1913) 79 Misc. 93. On this basis, the refusal of the vendor to deliver would excuse payment by the vendee. Aside from the tendency of the courts to find a bilateral contract if possible, there would seem to be no reason that an offer of this sort should not be taken as contemplating a unilateral contract. If thus construed, tender of payment instead of being one of the concurrent conditions in the performance of the contract, would be the act of acceptance from which alone the contract could arise. Refusal by the offeror to deliver would not excuse tender, but would be an absolute revocation of the offer, and later tender would be of no avail to bind the offeror. The courts, however, seem loath to construe an offer in such a way as to reach this result, except where it expressly calls for acceptance by a specific act, as payment of the agreed price. *Winders* v. *Kenan* (1913) 161 N. C. 628; *cf. Isham* v. *Therasson* (1894) 53 N. J. Eq. 10; *Pollock* v. *Riddick* (1908) 161 Fed. 280.

CORPORATIONS—OFFENSES—CONCEALMENT OF ASSETS.—The defendant, president of a bankrupt corporation, was convicted under the United States Criminal Code, § 332, for aiding and abetting a bankrupt corporation to commit the criminal offense of knowingly and fraudulently concealing its property from its trustee, contrary to § 29 (b) of the Bankruptcy Act. *Kaufman* v. *United States* (C. C. A. 1914) 212 Fed. 613.

This case holds a corporation liable for acts of its agents although knowledge was an essential ingredient of the offense under the statute. Since an individual principal could not be indicted in such a case for the fraud of his agent, owing to the fact that a guilty mind is essential, it seems that a corporation should be held to no greater liability. For a discussion of the principles involved, see 14 Columbia Law Rev. 6.

CRIMINAL LAW—SOLICITATION—ATTEMPT.—An indictment charged that the defendant attempted to burn a warehouse and that he solicited the burning. *Held,* although the mere solicitation was not an attempt, it was indictable as a distinct offense. *State* v. *Donovan* (Del. 1914) 90 Atl. 220.

The elements of a common law attempt are intent coupled with some overt act which goes beyond mere preparation but falls short of the completed crime. 1 Bishop, Criminal Law, § 435; *Graham* v. *People* (1899) 181 Ill. 477. Since solicitation is not such an act as will satisfy these requirements, it is not generally regarded as an attempt; *Stabler* v. *Commonwealth* (1880) 95 Pa. 318; *Commonwealth* v. *Flagg* (1883) 135 Mass. 545; see *Commonwealth* v. *McGregor* (1897) 6 Pa. Dist. 343; *contra,* 1 Bishop, Criminal Law (8th ed.) §§ 767-769; and, in most of the cases which are cited as authority for the proposition that solicitation is an attempt, it will be found that there was solicitation plus some other overt act directed toward the commission of the crime, or that the decision was based upon a statute directly covering the point. *People* v. *Bush* (N. Y. 1843) 4 Hill 133; *McDermott* v. *People* (N. Y. 1860) 5 Park. C. C. 102; *State* v. *Hayes* (1883) 78 Mo. 307; but see *McDade* v. *People* (1874) 29 Mich. 50. At least one authoritative early case holds that there may be an attempt to solicit, *Regina* v. *Ransford* (1874) 13 Cox C. C. 9, and if solicitation be regarded as an attempt, this leads to the result that a man may be indicted for an attempt at an attempt, a position which is untenable. *Wilson* v. *State* (1874) 53 Ga. 205. Though solicitation is not an attempt, the great weight of authority holds that it is indictable as a distinct offense, *contra,* 1 Wharton, Criminal Law (11th ed.) § 218; but see *Cox* v. *People* (1876) 82 Ill. 191; *State* v. *Baller* (1885) 26 W. Va. 90, either where the solicitation is to commit a felony, *Commonwealth* v. *Flagg, supra; Commonwealth* v. *Randolph* (1892) 146 Pa. 83, or a crime especially affecting public police or economy, whether felony or misdemeanor. *Commonwealth* v. *Hutchinson* (1898) 6 Pa. Super. Ct. 405; *State* v. *Quinlan* (N. J. 1914) 91 Atl. 111; but see 1 Bishop, Criminal Law, § 768 (d). In the principal case the offense charged was indictable under either of these classifications, and the result reached and the *ratio decidendi* are therefore manifestly sound.

CRIMINAL LAW—SUSPENSION OF SENTENCE—PROBATION LAWS.—During suspension of sentence, the defendant was placed under a probation officer. *Held,* such time can not be counted in satisfaction of the sen-

tence, if suspension is subsequently revoked. *Belden* v. *Hugo* (Conn. 1914) 91 Atl. 367.

Since an indefinite suspension of sentence is equivalent to a reprieve by the governor, it is encroachment on the powers of the executive, and contrary to the Constitution. For this reason the court had not the power at common law to suspend sentence indefinitely, even with the consent of the defendant. *In re Webb* (1895) 89 Wis. 354; *contra, Gehrman* v. *Osborne* (N. J. 1912) 82 Atl. 424, 429. The legislature may, however, as in the principal case, confer upon the court the power to grant a valid suspension by probation laws. Even then the power of the court is subject to the consent of the defendant, and although his consent will be presumed in the absence of objection on his part, he may, if he prefer, compel the immediate execution of the sentence by a writ of mandamus. See *Gehrman* v. *Osborne, supra.* Since the suspension is valid there can be no question as to the power of the court to execute sentence upon revocation of the suspension, and the full time must be served beginning from the time of the second commitment, as in the principal case, for mere lapse of time without imprisonment is in no sense an execution of the sentence. *Dolan's Case* (1869) 101 Mass. 219; *Ex parte Vance* (1891) 90 Cal. 208. Where the court has no power indefinitely to suspend sentence it has been held that if it attempts so to do, the void suspension operates as a discharge, and the court, after the expiration of the term of imprisonment named in the sentence, has no more power to enforce execution. *Ex parte Clendenning* (1908) 22 Okla. 108, 116; *In re Webb, supra.* This view is objectionable, not only because it is contrary to the rule in *Dolan's Case, supra,* but also because it is an encroachment on the powers of the executive, since after the expiration of the term, the convicted person is immune just as though he had been reprieved by the governor. The contrary view, that a sentence is always enforcible even in spite of an invalid suspension, is, therefore, preferable. *State* v. *Abbott* (1910) 87 S. C. 466, 473.

EASEMENTS—PRESCRIPTION—PRESUMPTION OF NOTICE TO RAILROAD.—Ways across and along a railroad were claimed by prescription. *Held,* although the ways were well defined and were used openly for more than twenty years, no presumption of knowledge on the part of the railroad will arise. *Semble,* even if prescriptive rights can be acquired against a railroad, positive notice of the adverse claim must be given, or the hostile acts must be sufficient to notify a railroad, as distinguished from an individual, of the claimant's user. *Heaton* v. *New York Cent. & H. R. R. R.* (1914) 149 N. Y. Supp. 71.

Knowledge and acquiescense upon the part of the owner of the servient estate is necessary to establish an easement by prescription. This knowledge need not arise from actual notice, but it will be presumed from open, notorious and adverse user for the statutory period. See 11 Columbia Law Rev. 672. Such a presumption is ordinarily justified when the use is not clandestine or by stealth. See *Silva* v. *Hawn* (1909) 10 Cal. App. 544; *Ward* v. *Warren* (1880) 82 N. Y. 865. Although the courts seem to have felt that railroads should be given greater protection against the acquisition of prescriptive rights than a private individual, the fact that the railroad is a quasi-public corporation should not prevent the application of well-settled legal principles. See p. 683, *infra.* While it may seem prudent to protect railroads in country districts from numerous easement suits, this is rather a field for legislation than for judicial interference.

EASEMENTS—PRESCRIPTION—RIGHTS ACROSS AND ALONGSIDE RAILROADS.—Ways alongside of and across railroad tracks were claimed by prescription. *Semble,* a prescriptive right of way may not be acquired against a railroad. *Heaton* v. *New York Cent. & H. R. R. R.* (1914) 149 N. Y. Supp. 71.

Adverse user upon which prescription is founded, must be peaceable to prove acquiescence by the owner of a servient estate. It has been argued that, therefore, prescription alongside of railroad tracks is impossible since the construction and use of the tracks is a "defiant badge of ownership" to the entire width of the right of way. *Pennsylvania R. R.* v. *Freeport* (1890) 138 Pa. 91; *Andries* v. *Detroit etc. R. R.* (1895) 105 Mich. 557. This contention is, however, not tenable because the defiance is a demonstrative proof that the use is adverse and under a claim of right, and a mere protest is not sufficient to defeat prescription. See *Lehigh Valley R. R.* v. *McFarlan* (1881) 43 N. J. L. 605, 631. Other courts hold that the use is permissive as long as it is not inconsistent with the railroad's use. *Louisville & N. R. R.* v. *Hagan* (1910) 141 Ky. 20; *Concklin* v. *New York Cent. & H. R. R. R.* (N. Y. 1912) 149 App. Div. 739; *France* v. *Chesapeake & O. R. R.* (1913) 156 Ky. 126; *contra, Fitchburg R. R.* v. *Page* (1881) 131 Mass. 391. Since such use is, however, a trespass, it is manifestly unsound to hold it permissive. Still other courts hold that since the granting of an easement by a railroad alongside its tracks is contrary to the purposes for which it was chartered, any presumption of a grant, which is requisite to prescription, is unfounded. *Sapp* v. *Northern Cent. R. R.* (1878) 51 Md. 115; see *Louisville & N. R. R.* v. *Smith* (1907) 125 Ky. 336. But the railroad could again acquire this easement by condemnation, and the public would not thereby suffer, but the railroad would merely pay for its own negligence. And the arguments of these courts surely do not apply to easements across tracks for such an easement might be subject to the superior rights of the railroad. *Turner* v. *Fitchburg R. R.* (1888) 145 Mass. 433; *Bubenzer* v. *Phila., B. & W. R. R.* (1904) 57 Atl. 242. It would seem, therefore, that by the application of legal rules, prescription should be allowed against a railroad, but the courts constantly seek to circumvent these established principles for the sake of policy.

EQUITABLE MORTGAGES—DEPOSIT OF TITLE DEEDS TO LAND.—An unrecorded title deed was deposited with the defendant as security for advances. *Held,* this creates an equitable mortgage, and the transaction is not within the Statute of Frauds. *Jennings* v. *Augir* (D. C. W. D. Wash. 1914) 215 Fed. 658.

The plaintiff deposited with a bank as security his final homestead certificates. *Held,* no equitable mortgage is created, because of the Statute of Frauds, and the Recording Acts. *Grames* v. *Consolidated Timber Co.* (D. C. Ore. 1914) 215 Fed. 785. See Notes, p. 672.

EQUITY—SPECIFIC PERFORMANCE—NEGATIVE COVENANTS.—The plaintiff and the defendant A entered into an agreement purporting to cover a period from October 20th, 1912, to October 20th, 1915, whereby the defendant A was to furnish certain drawings for which the plaintiff promised to pay a stipulated price. The effect of other stipulations, however, was to make it optional with the defendant A to furnish drawings after October 20th, 1913, at the expiration of the first year, and in the event of his electing not to proceed under the contract, the plaintiff had the right to rid itself of its obligations. But the defend-

ant A agreed to make no drawings for any other publication during the entire period of three years. The plaintiff asks for an injunction restraining the defendant A from furnishing drawings to the defendant B. *Held*, complaint dismissed. *Star Co.* v. *Press Pub. Co.* (N. Y. 1914) 162 App. Div. 486.

The theory upon which the court proceeded is two-fold. First, that at least for the last two years covered by the contract, the agreement imposed "no fixed and definite obligation" upon either party, and secondly, that the negative covenant not to supply drawings was unsupported by any affirmative covenant, and it was, therefore, unenforcible. But it is submitted that the consideration for the defendant's negative covenant was amply supplied by the plaintiff's promise to employ and pay the defendant A during the first year, and to release him from his obligations after the first year in the event that he chose not to proceed under the contract. Thus the contract is not lacking in mutuality of obligation. While it is true, moreover, if the defendant exercised his option after the first year not actively to proceed under the contract, the negative covenant would be the only remaining obligation resting on the defendant A, it is indeed difficult to conceive of any reasons why the negative covenant should not be enforced. The decision might be supported, however, on the ground that an injunction would impose an undue hardship on the defendant. For a further discussion of the principles involved, see 6 Columbia Law Rev. 82; 7 Columbia Law Rev. 204; 9 Columbia Law Rev. 540; 10 Columbia Law Rev. 559.

EVIDENCE—LIBEL AND SLANDER—OPINION THAT LIBEL REFERRED TO PLAINTIFF.—In an action for libel the testimony of witnesses that on reading the defendant's article about "a certain benedict" they understood it to refer to the plaintiff was *held* admissible. *Colbert* v. *Journal Pub. Co.* (N. Mex. 1914) 142 Pac. 146.

The general rule that the opinion of witnesses is inadmissible in evidence is almost everywhere held not to apply in determining to whom a libel refers. *Enquirer Co.* v. *Johnston* (1896) 72 Fed. 443; see *Prosser* v. *Callis* (1888) 117 Ind. 105; *Goldsborough* v. *Orem & Johnson* (1906) 103 Md. 671. As this is to be established by the testimony of persons acquainted with the parties and circumstances it is said that "from the nature of the case" opinion evidence must be admitted. 2 Greenleaf, Evidence, § 417; *contra Stokes* v. *Morning Journal Assn.* (N. Y. 1901) 66 App. Div. 569; *People* v. *Parr* (N. Y. 1886) 42 Hun 313. The peculiar New York doctrine appears to be based on a *dictum* in *Van Vechten* v. *Hopkins* (N. Y. 1809) 5 Johns. 211, that the opinion of a witness should have no influence on the verdict and that the innuendo in an action for libel is not subject to proof, because it is a matter of law. The only evidence the plaintiff can offer in New York is that the circumstances set forth in the libel were descriptive of the plaintiff and his position. *Stokes* v. *Morning Journal Assn., supra,* 571. If a libel is in a foreign language the one to whom it was published must be shown to have understood it, *Mielanz* v. *Quasdorf* (1886) 68 Ia. 726; *Wormouth* v. *Cramer* (N. Y. 1829) 3 Wend. 394; Burdick, Torts (3rd ed.) § 345, and the understanding of witnesses would seem to be as much a fact to be proved when the libel is obscure in its reference to the plaintiff as when it is in a foreign tongue, at any rate as a factor in determining damage. The witness testifies to the fact of how the libel was understood, not to his opinion of how it was meant, and how it was understood is the important thing.

EXECUTORS AND ADMINISTRATORS—LIABILITY FOR FUNERAL EXPENSES.—The plaintiff brings an action against the defendant, as executrix, for the funeral expenses of her testator. *Held,* that since funeral expenses are both by statute and at common law debts of the estate an action therefor may be maintained against the executor in his representative capacity. *Golden Gate Undertaking Co.* v. *Taylor* (Cal. 1914) 141 Pac. 923.

It has long been settled that the law will imply a promise on the part of a personal representative to pay the reasonable expenses of a suitable funeral for the decedent, if he has sufficient assets in hand, *Tugwell* v. *Heyman* (1812) 3 Campb. 298, even though the funeral was ordered by a third party. *Rogers* v. *Price* (1829) 3 Younge & Jervis, 28. The rule has been established in some jurisdictions that an executor or administrator is personally liable upon this promise. *Dampier* v. *St. Paul Trust Co.* (1891) 46 Minn. 526; see *Matter of Wingersky* (N. Y. 1911) 75 Misc. 79. But when it is considered that the promise is implied without reference to any action of the representative, *Parker* v. *Lewis* (1828) 13 N. C. 21, that it may relate to circumstances arising before his appointment, *Phillips* v. *Phillips* (1895) 87 Me. 324, and is binding only in so far as he has assets, *Kittle* v. *Huntley* (N. Y. 1893) 67 Hun 617, see *Dampier* v. *St. Paul Trust Co., supra,* it would seem that the claim is essentially one against the estate itself, *Fogg* v. *Holbrook* (1895) 88 Me. 169, and that judgment upon it should be given *de bonis testatoris. Hapgood* v. *Houghton* (Mass. 1830) 10 Pick. 154. Moreover, in order to obtain a judgment that will bind the estate of a deceased, the representative thereof must be sued in his representative capacity. *Lewis* v. *Nichols* (1873) 38 Tex. 54. When, therefore, as in the principal case, a statute specifically recognizes funeral expenses as a debt of the estate, it must be regarded as establishing beyond question that the representive is liable for them in his official capacity. See *Campfield* v. *Ely* (1832) 13 N. J. L. 150.

EXTRADITION—HABEAS CORPUS IN INTERSTATE RENDITION PROCEEDINGS.—In 1908, Thaw was acquitted in New York of the charge of homicide, on the ground of insanity, and was, under statutory authority, committed to the State Asylum for the Criminal Insane. In 1913 he escaped, was found in New Hampshire, and upon requisition of the Governor of New York, the Governor of New Hampshire issued a warrant for his arrest and rendition. On habeas corpus to test the validity of his detention, *held,* he should be discharged. *Ex parte Thaw* (D. C. 1914) 214 Fed. 423. See Notes, p. 665.

HIGHWAYS—DEDICATION—RESERVATIONS VOID AS AGAINST PUBLIC POLICY.—An owner dedicated certain lands for streets retaining the fee and reserving the right to lay water and gas pipes, and electric wires, and to erect poles for such purpose, and to construct and operate cable and motor railways. *Held,* the reservations were void as against public policy. *Bradley* v. *Spokane & I. E. R. R.* (Wash. 1914) 140 Pac. 688.

When land is dedicated for public purposes its uses may be limited. *Morrison* v. *Hinkson* (1877) 87 Ill. 587; *Church* v. *Portland* (1889) 18 Ore. 73; *Young* v. *Landis* (1906) 73 N. J. L. 266. But the courts often say that no limitations can be made inconsistent with the specified purposes of the dedication. See *Noblesville* v. *Lake Erie & Western R. R.* (1891) 130 Ind. 1. In applying this principle, however, they readily allow, as consistent, reservations fully as extensive as those in

the principal case. *Hughes* v. *Bingham* (1892) 135 N. Y. 347; *Oklahoma etc. Ry.* v. *Dunham* (1905) 39 Tex. App. 575; *Tallon* v. *Hoboken* (1897) 60 N. J. L. 212; but *cf. Jones* v. *Carter* (1907) 45 Tex. Civ. App. 450. But if a limitation is deemed inconsistent many courts seem to hold it void and the dedication valid without the limitation. *State* v. *Spokane Street Ry.* (1898) 19 Wash. 518; *Jones* v. *Carter. supra.* The court in these decisions may be influenced by the fact that reservations and conditions in a deed repugnant to a grant in fee simple are held void and the grant allowed. *DePeyster* v. *Michael* (1852) 6 N. Y. 467; *Dennison* v. *Taylor* (N. Y. 1884) 15 Abb. N. C. 439. But at common law the grant of a highway might be of varying extent and limitations could be considered repugnant only on the doubtful theory that the grant has now come to carry necessary fixed incidents, such as the right to lay gas and water pipes. It would rather appear that the easement granted the public was no more extensive than the grantor's dedication, and if the dedication was too limited to give the public an adequate use the public would acquire nothing. See *Hemphill* v. *Boston* (1851) 62 Mass. 195; *DuBuque* v. *Benson* (1867) 23 Ia. 248.

INJUNCTION—CONTRACT FOR PERSONAL SERVICES—MUTUALITY.—The defendant entered into a contract with the plaintiff whereby he agreed to play baseball for the latter and for no other club for a period of one year, 25 per cent of his salary being consideration for the right of the plaintiff to preemption to contract for his services for another year. The plaintiff was also given the power to discharge the defendant upon ten days' notice. There were other provisions which resulted in subordinating the right of the defendant to play with any other team whatsoever. *Held,* the plaintiff may enjoin the defendant from playing with another club in breach of his contract. *Cincinnati Exhibition Co.* v. *Marsans* (D. C. E. D. Mo. 1914) 216 Fed. 269.

On the same facts, *held,* the injunction will be refused. *American League, etc., Club of Chicago* v. *Chase* (N. Y. 1914) 86 Misc. 441; *Cincinnati Exhibition Co.* v. *Johnson* (Ill. Appellate Court, June 16, 1914). Not yet reported.

Where there is an affirmative contract for unique and special personal services coupled with an agreement not to perform such services for others, an injunction will issue to restrain the defendant from violating the negative provision. 7 Columbia Law Rev. 204; 10 Columbia Law Rev. 559. When, however, the contract lacks mutuality in obligation, the defendant will not be so enjoined. The contract under consideration does not lack mutuality as a result of the ten-day clause alone, *Philadelphia Baseball Club* v. *Lajoie* (1902) 202 Pa. 210; see *McCall* v. *Wright* (1910) 198 N. Y. 143; *contra, Rust* v. *Conrad* (1882) 47 Mich. 449, since the contract is enforcible even though it is in the power of the plaintiff to terminate his obligation before the end of the contract term; but its obvious unfairness, manifest in all of its provisions which reduced the defendant to a state of quasi-peonage, justified the court in refusing to interfere to prevent the defendant from pursuing his vocation elsewhere. 9 Columbia Law. Rev. 540. The *Chase* and *Johnson* cases are clearly correct, and should be entitled to more weight than the *Marsans* case for the reason that in addition to the fact that the latter case is unsupportable in theory, the court fails to cite any authorities for its view.

INSANITY—EFFECT OF UPON CONTRACTS.—A statute provided that a contract by a lunatic, made before he was found insane by a jury, might be avoided. In an action of ejectment, *held,* his deed was merely voidable and passed legal title. *Walton* v. *Malcolm* (Ill. 1914) 106 N. E. 211. See Notes, p. 674.

INSURANCE—FIRE INSURANCE—APPRAISEMENT AS A CONDITION PRECEDENT TO RECOVERY ON POLICY.—The appraisers, appointed pursuant to an arbitration clause in an insurance policy to determine the loss occasioned by fire, failed, without fault of either party, to make an award. *Held,* the insured need not select another arbitrator, but might bring suit on the policy. *St. Paul etc. Ins. Co.* v. *Kirkpatrick* (Tenn. 1914) 164 S. W. 1186.

If the provision for arbitration to determine the loss is merely an independent covenant, non-performance is not a bar to an action on the policy. *Chadwick* v. *Phoenix etc. Assn.* (1906) 143 Mich. 481. The usual stipulation, however, makes the arbitration a condition precedent to bringing suit, and, as it merely provides for a method of ascertaining the loss in case of dispute, is recognized as valid. *Hamilton* v. *Liverpool etc. Ins. Co.* (1889) 136 U. S. 242, 255. Unless, therefore, performance or legal excuse for non-performance is alleged, no cause of action is stated. *Southern Home Ins. Co.* v. *Faulkner* (1909) 57 Fla. 194; *Graham* v. *German American Ins. Co.* (1906) 75 Oh. St. 374. It seems clear that under the circumstances of the principal case, where arbitrators fail to agree without fault of either party, the ineffectual attempt to perform is not a compliance with the condition, and the insured should take proper steps to secure a valid appraisement. *Westenhaver* v. *German American Ins. Co.* (1900) 113 Ia. 726; *Vernon Ins. Co.* v. *Maitlen* (1902) 158 Ind. 393; *Grady* v. *Home etc. Ins. Co.* (1906) 27 R. I. 435. Some courts, however, hold, by means of a forced construction of the condition, that when the insured appoints an appraiser in good faith, he discharges his obligation and may bring suit, though the award fail. *Jerrils* v. *German American Ins. Co.* (1910) 82 Kan. 320; see *Western Assurance Co.* v. *Decker* (C. C. A. 1899) 98 Fed. 381. The objection that the rights of the insured would suffer from an ineffectual arbitration is not justified, for any fraud, hindrance or delay on the insurer's part is held to be a waiver of the condition, *Uhrig* v. *Williamsburg City Fire Ins. Co.* (1886) 101 N. Y. 362, and if the insurer's appraiser is guilty of such conduct, the courts are not slow to impute it to the company. See *Niagara Fire Ins. Co.* v. *Bishop* (1894) 154 Ill. 9; *Brock* v. *Dwelling House Ins. Co.* (1894) 102 Mich. 583.

INTERSTATE COMMERCE—COMMON CARRIERS—PIPE LINE COMPANIES.—Congress passed an act making all persons engaged in the transportation of oil common carriers. *Held,* although, in a particular case, all the oil transported belongs to the owners of the pipe line, the statute is nevertheless a valid exercise of the power to regulate interstate commerce. *United States* v. *Ohio Oil Co.* (1914) 34 Sup. Ct. Rep. 956. See Notes, p. 662.

INTERSTATE COMMERCE—WHAT CONSTITUTES—WIRELESS TELEGRAPH.—A statute levied a tax on all foreign corporations within the State, doing business other than interstate commerce. *Held,* that a company owning stations from which wireless messages were sent to ships and

foreign countries exclusively was engaged in interstate commerce and was therefore, exempt from the tax. *Cheney Bros. Co.* v. *Commonwealth* (Mass. 1914) 106 N. E. 310.

The courts generally conceive of commerce as the transportation of the tangible, but have held telegraph companies to be engaged in interstate commerce from a desire to bring them under uniform federal jurisdiction. The same reasons would seem to apply for considering wireless telegraphy interstate commerce. The application of the Commerce Clause to the intangible is discussed in 14 Columbia Law Rev. 147.

MANDAMUS—DISCRETION OF PUBLIC OFFICERS—RIGHT OF UNSUCCESSFUL BIDDER FOR PUBLIC CONTRACT.—A City Council, in bad faith, voted to award a contract for public printing to the higher of two bidders, although an ordinance required that every contract be let to the lowest and best bidder. *Held,* that on the relation of the lowest bidder a writ of mandamus would issue to compel the council to annul its proceedings and award the contract to the lowest bidder. *State ex rel. Journal Printing Co.* v. *Dreyer* (Mo. 1914) 167 S. W. 1123.

The general rule is well established that mandamus will not lie to control the discretion of public officials. *Butler* v. *Printing Commissioners* (1911) 68 W. Va. 493; *Madison* v. *Harbor Board* (1892) 76 Md. 395. This exemption, however, is limited to cases where the discretion is exercised reasonably and in good faith, and the writ will issue where the exercise is fraudulent or even arbitrary and capricious. *People* v. *State Racing Commission* (1907) 190 N. Y. 31; *State* v. *Adcock* (1907) 206 Mo. 550. The logical basis of interference by mandamus where discretion has been abused seems to be that the officer really has not exercised his discretion at all, *State* v. *Hindson* (1912) 44 Mont. 429, and in such cases, the courts properly order the exercise of discretion without controlling the manner of its exercise. See *Kimberlin* v. *Commission* (C. C. A. 1900) 104 Fed. 653. Since the award of contracts to the "lowest and best bidder" involves discretion, *State* v. *Lincoln* (1903) 68 Neb. 597, it would seem that in the principal case the court should have required a reconsideration of the bid, but should not have commanded the award of the contract to the relator. *State* v. *Public Schools* (1896) 134 Mo. 296; see *In re Hilton etc. Co.* (N. Y. 1897) 13 App. Div. 24. Where, however, but one course of procedure is open, the courts have frequently required the official to follow it. *Marsh* v. *State* (1902) 96 N. W. 520; *State* v. *Matthews* (1908) 81 S. C. 414. Whenever jurisdiction is taken, the writ will usually be granted on the relation of a disappointed bidder; *Marsh* v. *State, supra; State* v. *Bourne* (1910) 151 Mo. App. 104; but it is difficult on theory to find sufficient interest in him, since he has no contract rights, and the statute is not intended for his benefit. *Commonwealth* v. *Mitchell* (1876) 82 Pa. 343; see *State* v. *Board of Education* (1869) 24 Wis. 683; *Colorado Paving Co.* v. *Murphy* (C. C. A. 1897) 78 Fed. 28.

MARRIAGE—ANNULMENT—NONAGE OF PARTIES.—Washington statutes make 21 and 18 the ages at which males and females, respectively, may enter into the contract of marriage, and forbid the issuance of marriage licenses to persons below legal age except on consent of their parents. *Held,* the legal age of consent to marry remains 14 for males and 12 for females, and a marriage between a man of 18 and a girl of 17,

though consummated without parental sanction, is binding. *Cushman* v. *Cushman* (Wash. 1914) 142 Pac. 26.

Marriages below the legal age of consent to marry are not void unless expressly so declared by statute. *Hiram* v. *Pierce* (1858) 45 Me. 367; *Reifschneider* v. *Reifschneider* (1909) 241 Ill. 92; *Hunter* v. *Milam* (Cal. 1895) 41 Pac. 332. They are, however, voidable both at common law, 2 Kent Comm. *78, and under modern statutes. *Mundell* v. *Coster* (N. Y. 1913) 80 Misc. 337; *State* v. *Lowell* (1899) 78 Minn. 166; *Cunningham* v. *Cunningham* (1912) 206 N. Y. 341. Some courts hold that statutes fixing the age at which marriage may be contracted without the consent of parents make that the legal age of consent to marry, and render voidable marriages between persons above the common law age of consent but below the statutory age. *Mundell* v. *Coster, supra; Cunningham* v. *Cunningham, supra; State* v. *Lowell, supra.* But this seems to be in contravention of public policy since it permits trial marriages, dissoluble at will, between persons below the statutory age. See Bishop, Marriage, Divorce & Separation, § 586; *Mundel* v. *Coster, supra,* p. 339. The preferable view would therefore seem to be, as was held in the principal case, that such statutes leave the common law age of consent to marry unchanged and such marriages are therefore binding. *Hiram* v. *Pierce, supra; Reifschneider* v. *Reifschneider, supra.*

MARRIAGES—COMMON LAW MARRIAGE—VALIDITY.—A common law marriage was consummated while a statute was in force prescribing that a license for that purpose must first be obtained. *Held,* the marriage was valid. *In re Love's Estate* (Okla. 1914) 142 Pac. 305.

A marriage is perfectly valid at common law even if all ceremony be dispensed with as long as the parties consent presently to live together as husband and wife. *Van Tuyl* v. *Van Tuyl* (N. Y. 1869) 57 Barb. 235; *Meister* v. *Moore* (1877) 96 U. S. 76; *contra, Norcross* v. *Norcross* (1892) 155 Mass. 425; *Denison* v. *Denison* (1871) 35 Md. 361. There are authorities that hold that a marriage may also be lawfully contracted *per verba de futuro* followed by *copula* in pursuance of the agreement. Tiffany, Persons & Domestic Relations, 31; *Robertson* v. *State* (1868) 42 Ala. 509; see *Stultz* v. *Doering* (1885) 112 Ill. 234; *contra, Cheney* v. *Arnold* (1857) 15 N. Y. 345. Since, however, a marriage must be consummated at the time of the agreement and not be left for the future, a marriage *de futuro* with *copula* virtually amounts to nothing more than a marriage *in praesenti,* the parties being presumed to have accepted each other as man and wife at the time of the *copula.* See *Cartwright* v. *McGown* (1887) 121 Ill. 388. In most of the States statutes have been enacted prescribing certain formalities to be observed in the celebration of marriages, but marriages valid at common law are held, as in the principal case, to be valid in spite of noncompliance with the requirements set forth, unless the statute contains express words of nullity. See *Meister* v. *Moore, supra; Heymann* v. *Heymann* (1905) 218 Ill. 636; *Askew* v. *Dupree* (1860) 30 Ga. 173; but see *Robertson* v. *State, supra.* Such was the case in New York, when by Laws of 1901, c. 339, § 19, common law marriages were by necessary implication forbidden. By the Laws of 1907, c. 742, § 6, however, § 19 of the Laws of 1901 was expressly repealed, and although there has been no express adjudication on this point, there is no reason why the validity of common law marriages in New York was not reinstated by this repealing statute. See *Matter of Hinman* (N. Y. 1911) 147 App. Div. 452.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—OCCUPATIONAL DISEASES.—A widow claimed compensation for the death of her husband from lead poisoning, under the Workmen's Compensation Act of Michigan. *Held,* the statute applies only to accidental injuries and not to occupational diseases. *Adams* v. *Acme White Lead & Color Works* (Mich. 1914) 148 N. W. 485.

Under the original English Act of 1897, 60 & 61 Vict., c. 37, compensation for diseases was allowed only when it could be shown to have resulted from accident. *Turvey* v. *Brintons, Ltd.* L. R. [1904] 1 K. B. 331, affd. L. R. [1905] A. C. 230; *Fenton* v. *Thorley Co.* L. R. [1903] A. C. 443. Diseases induced by infection were included under this head. *Turvey* v. *Brintons, Ltd., supra.* But the cause of the disease had to be fixed, both as to time and place, and this is necessary even under the present statute, 6 Edw. VII, c. 58, as regards all diseases except those for which the new act makes separate provision. See *Eke* v. *Hart-Dyke* L. R. [1910] 2 K. B. 677. In New Jersey, where the statute is similar to that in England, it seems that the same rules are applied. See *Liondale etc. Works* v. *Riker* (1914) 85 N. J. L. 426. The omission of the word accident from the Massachusetts statute is regarded as significant of the intention of the legislature to compensate for all injuries suffered in the course of the employment, whether of an accidental nature or not; and accordingly, compensation may be had for occupational diseases. *Johnson* v. *London Guarantee & Accident Co.* (Mass. 1914) 104 N. E. 735; *In re Hurle* (Mass. 1914) 104 N. E. 336. The rule adopted in the principal case, in addition to being a fair interpretation of the statute, seems to be a proper limitation of its scope. Considerations of justice and expediency require that compensation for occupational diseases should not be allowed under such an act as this, which makes no provision for apportioning liability for injuries of gradual growth among the several employers in whose service they may have been contracted. See 14 Columbia Law Rev. 563.

MONOPOLIES—SHERMAN ANTI-TRUST ACT—SIZE AS MONOPOLY.—The defendant, through the consolidation of six competing corporations, brought under its control 80 per cent of the business of manufacturing harvesting machinery and certain other farmers' implements. Prices had not been unreasonably raised, the defendant had acquired its dominant position almost entirely through business efficiency, and had not been guilty of any unfair competition for the past seven years. In an equity suit under § 4 of the Anti-Trust Act, it was *held,* Sanborn, J., dissenting, a decree of dissolution should issue. *United States* v. *International Harvester Co.* (D. C. Minn. 1914) 214 Fed. 987. See Notes, p. 659.

MUNICIPAL CORPORATIONS—GOVERNMENTAL POWERS AND FUNCTIONS—RIGHT TO PREFERENCE FOR CLAIM.—The City of New York, having money on deposit in a bank which became insolvent, petitioned the superintendent of banks for prior payment of its claim. *Held,* the city was not entitled to such priority. *In re Northern Bank of New York* (1914) 148 N. Y. Supp. 70.

Under the Bankruptcy Act of 1898 c. 3, § 17 (1), a city is entitled to priority in the payment of taxes due from the insolvent. But the deposit in question, although derived partly from taxes, was not "taxes due the city" so as to bring it within the scope of the Act.

In re Waller (D. C. 1905) 142 Fed. 883; *Bent* v. *Hubbardston* (1884) 138 Mass. 99. The question, therefore, is whether the city had priority for a mere debt due to it. At common law the king by his prerogative was preferred over any subject in the payment of debts, 1 Co. Litt. 131(b.), and the State in its sovereign capacity succeeds to this priority of the king. *Matter of Carnegie Trust Co.* (1912) 206 N. Y. 390; 13 Columbia Law Rev. 757. A municipal corporation represents the State as regards a part of its function; but as to a great number of its affairs it acts in a purely private capacity. Dillon, Municipal Corporations (5th ed.) §§ 39, 1303; *South Pasadena* v. *Pasadena Land & Water Co.* (1908) 152 Cal. 579. Recognizing these different fields of municipal activity, the law does not extend immunity from tort actions, enjoyed by the State, to municipal corporations except in so far as they act in their governmental sphere, and leaves them liable as regards acts done in their private capacity. Burdick, Torts (3rd ed.) §§ 44, 126, 128. It would seem that the State's preference for debts should not be transferred to a county, *County of Glynn* v. *Terminal Co.* (1897) 101 Ga. 244, or to a municipal corporation, *U. S. Fidelity & Guaranty Co.* v. *Rainey* (1907) 120 Tenn. 357, 405, because of this dual capacity. But if the priority were granted at all, it should be extended only so far as has the municipality's immunity from tort liability, and apply only to those debts arising from the exercise of governmental functions.

NAVIGABLE WATERS—RIPARIAN RIGHTS—PARAMOUNT AUTHORITY OF THE UNITED STATES.—A statute giving the Secretary of War power to establish new harbor lines was construed to authorize him to remove wharves and piers extending beyond such new line. And such removal was *held* not to amount to a taking of property for which the owner may recover compensation. *Garrison* v. *Greenleaf Lumber Co.* (C. C. A. 1914) 215 Fed. 576.

It is established by the great weight of authority that whether the owner of lands adjacent to navigable waters is possessed of the fee of the submerged land, or holds only an easement of access, he has valuable property rights of which he cannot be deprived without just compensation. *Yates* v. *Milwaukee* (1870) 10 Wall. 497; *American Ice Co.* v. *New York* (1908) 193 N. Y. 673; *Lyon* v. *Fishmonger's Co.* (1876) L. R. 1 App. Cas. 662; *cf. Tomlin* v. *Dubuque etc. R. R.* (1871) 32 Ia. 106. Congress, however, in the regulation or improvement of commerce, may authorize acts which restrict if they do not destroy such owner's rights, and no compensation need be made. *United States* v. *Chandler-Dunbar Co.* (1913) 229 U. S. 53; *Lewis Blue Point Oyster Co.* v. *Briggs* (1913) 229 U. S. 82. It is said that all land under navigable water is subject to a servitude belonging to Congress to regulate navigation, and consequently that the exercise of such right does not constitute a taking of property within the meaning of the Fifth Amendment. *Lewis Blue Point Oyster Co.* v. *Briggs, supra; Gibson* v. *United States* (1897) 166 U. S. 269; *Scranton* v. *Wheeler* (1900) 179 U. S. 141. When, however, it is admitted that riparian rights though they may be incorporeal, constitute valuable property, it would seem that they should be protected, as they sometimes have been, even against the rights of Congress. See *United States* v. *Lynah* (1903) 188 U. S. 445; *Monongahela Nav. Co.* v. *United States* (1892) 148 U. S. 312. In this connection, it should be noted that English courts uphold the right to remove obstructions to navigation on the ground that they constitute a public nuisance which may be abated. *Attorney General* v. *Johnson* (1819) 2 Wilson's Ch. 87.

POLICE POWER—LIMITATION ON RIGHT TO CONTRACT—NIGHT WORK OF WOMEN.—Chapter 83 of the Laws of 1913, providing that "in order to protect the health and morals of females * * * no woman shall be employed * * * in any factory * * * before six o'clock in the morning or after ten o'clock in the evening * * * ," was *held* constitutional as a valid exercise of the police power for the protection of the health of women and of posterity. *People* v. *Charles Schweinler Press, Inc.* (1914) 148 N. Y. Supp. 725.

The general right to make a contract in relation to his business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Constitution of the United States. *Lochner* v. *New York* (1904) 198 U. S. 45; *Allgeyer* v. *Louisiana* (1896) 165 U. S. 578. The highest court in the jurisdiction of the principal case, seven years ago, unanimously held a similar statute, unconstitutional as infringing this right in adult female citizens. *People* v. *Williams* (1907) 189 N. Y. 131. The principal case holds that the purpose of the later statute as a health measure differentiates it from the one invalidated in 1907 and speaks of the advance since that time in social consciousness and in knowledge as to the evils of night work for women. The decision undoubtedly represents the tendency of the courts to keep abreast of public opinion and to extend the police power in deference to popular demands. *Cf. Holden* v. *Hardy* (1897) 169 U. S. 366, 385. The legislature may regulate the work of children, *People* v. *Ewer* (1894) 141 N. Y. 129, and of those in dangerous trades, *Holden* v. *Hardy, supra,* but it is a matter of individual opinion on political and social questions rather than of legal principle, whether the doctrine of the principal case is to be considered a wise application of sound social policy, *Muller* v. *Oregon* (1907) 208 U. S. 412; see *Commonwealth* v. *Hamilton Mfg. Co.* (1876) 120 Mass. 383, or a dangerous paternalistic invasion of personal liberty. *People* v. *Williams, supra; Ritchie* v. *People* (1895) 155 Ill. 98; see article by Ex-Chief Judge Cullen of the New York Court of Appeals, 48 Am. Law Rev. 345, 363.

RAILROADS—FENCES—INJURY TO ANIMALS.—The plaintiff's mule escaped through a defective fence on to a railroad track, fell into a trestle, and died from exposure. *Held,* since the statute requiring fencing applies only where the animal is struck by a train, there can be no recovery. *Galveston etc. Ry.* v. *Grace* (Tex. 1914) 164 S. W. 413.

At common law a railroad was under no duty of fencing its right of way, *Morss* v. *Boston etc. R. R.* (Mass. 1848) 2 Cush. 536, and the owner of cattle was obliged to keep them upon his own premises. *Pittsburg, etc. R. R.* v. *Stuart* (1880) 71 Ind. 500. But the railroad had to exercise some care to prevent injury to such cattle when discovered trespassing on its right of way. *Illinois etc. R. R.* v. *Middlesworth* (1868) 46 Ill. 494. Under the usual form of statute, making the railroad absolutely liable for all injuries to animals caused by engines or cars where there has been neglect of duty to fence, the courts generally confine the railroad's liability to the express terms of the statute, and accordingly actual collision of the train and the animal is held to be necessary for recovery. *Jimerson* v. *Erie R. R.* (1911) 203 N. Y. 518; *Schertz* v. *Indianapolis etc. Ry.* (1883) 107 Ill. 577; *Jefferson, etc. R. R.* v. *Downing* (1878) 61 Ind. 287. A few courts, however, have held that if the animal's injuries result from fright at a passing train, they are within the statute, *Chicago etc. R. R.* v. *Cox* (1897) 51 Neb. 479, and in at least one jurisdiction the statute expressly covers such

injuries. *Yeager* v. *Chicago etc. R. R.* (1895) 61 Mo. App. 594. Since these statutes impose a liability which does not exist at common law, it is proper for the courts to construe them strictly. The policy of such a statute, however, would seem to require an extension of its scope by the legislature, for if failure to fence is actionable negligence in one case it ought to be in all others where it constitutes the proximate cause of the injury.

SALES—IMPLIED WARRANTY—EFFECT OF EXPRESS WARRANTY.—The vendor of a dredge, who expressly warranted its capacity, sued for the purchase price. The vendee claimed that since the manufacturer knew the purpose for which the dredge was purchased, there was an implied warranty that it be reasonably adapted for that purpose. *Held,* the express warranty excluded the implied. *United Iron Works* v. *Outer Harbor, etc.* (Cal. 1914) 141 Pac. 917.

An express warranty will not ordinarily exclude an implied, if the latter is not inconsistent with the former, and therefore when the implied warranty relates to matter distinct from and independent of the express, it will be enforced. *Bigge* v. *Parkinson* (1862) 7 Hurl. & Nor. 954; *Merriam* v. *Field* (1869) 24 Wis. 640; see Uniform Sales Act, § 15, (6). When a machine is warranted to do a certain amount of work, or as good work as any other machine of the same kind made for the same purpose, an implied warranty of fitness is generally excluded, for the express warranty defines the degree of fitness for which the parties contracted. *Buckstaff* v. *Russell* (1897) 79 Fed. 611; *Reeves & Co.* v. *Byers* (1900) 155 Ind. 535. But where the express warranty relates merely to the make, size or grade of the machine, a warranty of fitness in a proper case will be implied. *International Harvester Co.* v. *Bean* (Ky. 1914) 169 S. W. 549; *Snyder* v. *Holt Mfg. Co.* (1901) 134 Cal. 324. If the machine is a stock article, well known in the trade, the purchaser is supposed to know what he is buying and the implied warranty is therefore limited to fitness for the general purpose for which it is manufactured, *Hawley etc. Co.* v. *Van Winkle Works* (1908) 4 Ga. App. 85, but if the machine is manufactured on a special order from the purchaser, for a particular purpose which the manufacturer knows, and there is no inconsistent express warranty, then the implied warranty is one of fitness for the special purpose of the purchaser. *Blackmore* v. *Fairbanks* (1890) 79 Ia. 282. As the express warranty in the principal case defines the amount of work the dredge was to do, any implied warranty relating to that subject must necessarily be inconsistent therewith, and the result reached by the court would therefore seem to be correct.

STATUTE OF FRAUDS—CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.—In a suit for breach of an oral contract, the defendant set up the Statute of Frauds. *Held,* since there was no time fixed for performance, and the subject matter did not make its performance within the year impossible, the contract is valid. *McLanahan* v. *Otto-Marmet Coal & Mining Co.* (W. Va. 1914) 82 S. E. 752.

An oral contract is within the statute, if it appears either from the express language of the parties, see *Herrin* v. *Butters* (1841) 20 Me. 119, or from the terms, subject matter, and surrounding circumstances of the contract that it is not intended to be performed within a year from the time of its making. *Boydell* v. *Drummond* (1809) 11 East 142; *Frary* v. *Sterling* (1868) 99 Mass. 461. When this has been affirmatively shown, the mere fact that the contract is physically capable

of performance within the year will not prevent the statute from applying. *Boydell* v. *Drummond, supra;* Browne, Statute of Frauds, § 281. On the other hand, the mere fact that the contract is not likely or even expected to be performed within the year, will not bring it within the statute if a fair and reasonable construction would be consistent with performance within a year. *Reckley* v. *Zenn* (W. Va. 1914) 81 S. E. 565. Accordingly, where a contingency may terminate the contract within a year, the statute does not apply, because the parties are supposed to have contemplated it, and they did not intend, therefore, that it should not be performed within a year. *Roberts* v. *Rockbottom Co.* (1843) 48 Mass. 46; see *Kent* v. *Kent* (1875) 62 N. Y. 560, 564; *contra, Packett Co.* v. *Sickles* (1866) 72 U. S. 580, 595. In the principal case the plaintiff was to cut the timber only as it was needed in the mining operations, which, according to his own testimony, would necessarily require five or six years. Since a fair and reasonable construction of the contract would therefore be inconsistent with performance within a year, the contract would, under the foregoing principles, seem to be within the statute.

TORTS—UNLAWFUL BOYCOTT—INJUNCTION.—The defendants, members of a labor union, threatened to strike against anyone purchasing masons' supplies of the plaintiff, who, against the protest of the union, had furnished such supplies to an employer of non-union labor. *Held,* that the action of the defendants was an infringement of the plaintiff's property rights by an unlawful boycott, and would be enjoined. *Burnham* v. *Dowd* (Mass. 1914) 104 N. E. 841.

Since the right of workingmen to combine for the betterment of their condition is now universally recognized, a strike is not *per se* unlawful, nor is it rendered unlawful by the fact that it may incidentally inflict injury upon others. *National Protective Assn.* v. *Cumming* (1902) 170 N. Y. 315. When, however, the infliction of such injury is the primary aim and object of the combination, it cannot be said to be one for the advancement of the interests of labor, but must then be regarded as having for its purpose an attack upon the property rights of another, *Lucke* v. *Clothing Cutters* (1893) 77 Md. 396; *Loewe* v. *Cal. State Fed. of Labor* (C. C. 1905) 139 Fed. 71; see *Gray* v. *Building Trades Council* (1903) 91 Minn. 171, even though the ultimate intention is to benefit the members of the union. *Purvis* v. *Local No. 500* (1906) 214 Pa. 348. The strike then as an act in furtherance of an unlawful conspiracy should be enjoined. *Albro J. Newton Co.* v. *Erickson* (1911) 126 N. Y. Supp. 949; see *National Fireproofing Co.* v. *Mason Builders' Assn.* (C. C. A. 1906) 169 Fed. 259. In accordance with this doctrine, is the rule laid down in *Pickett* v. *Walsh* (1906) 192 Mass. 572, that a strike against A, with whom the strikers have no trade dispute to compel him to join a boycott against B, is an illegal interference with A's business because not justified by the necessities of trade competition. Although actions which have by some courts been held to be within the scope of lawful competition, *National Protective Assn.* v. *Cumming, supra,* have by others been held to be illegal, *Plant* v. *Woods* (1900) 176 Mass. 492, there seems to be a substantial agreement that conduct such as that of the defendant in the principal case is a proper subject of injunction. *Thomas* v. *Cincinnati etc. Ry.* (C. C. 1894) 62 Fed. 803, 818; Burdick, Torts (3rd ed.) §77; 2 Cooley, Torts (3rd ed.) 602 *et seq.*